

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-05

Date issued: February 14, 1992

Requested by: James O. Johnson, Garrison City Attorney

- QUESTION PRESENTED -

Whether an alcoholic beverage licensee may sell, dispense, or allow consumption of alcoholic beverages on licensed premises on a Sunday if that licensee has a permit issued by the local governing body solely under the provisions of N. D. C. C. ' 5-02-01. 1.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that an alcoholic beverage licensee may not sell, dispense, or allow consumption of alcoholic beverages on licensed premises on a Sunday if that licensee has a permit issued by the local governing body solely under the provisions of N. D. C. C. ' 5-02-01. 1.

- ANALYSIS -

N. D. C. C. ' 5-02-01. 1 provides:

5-02-01. 1. Special permit authorized - Penalty. The local governing body may by special permit authorize an on sale, off sale, or on or off sale alcoholic beverage licensee to engage in the sale of alcoholic beverages at special events designated by the permit. A fee for the local special permit may be set by ordinance or resolution at not more than twenty-five dollars. The permit may not be valid for a period greater than fourteen days, and may include Sundays. The local governing body may establish rules as it may deem proper to regulate and restrict the operation of a special permit. Any person who dispenses, sells, or permits the consumption of alcoholic beverages in violation of this section or the conditions of a special permit is guilty of a class B misdemeanor.

Although this section authorizes the section 5-02-01.1 permit to be effective for a Sunday, N. D. C. C. ' 5-02-05 specifically sets forth limitations and restrictions on the authority of an alcoholic beverage licensee to dispense or allow the consumption of alcoholic beverages on licensed premises after 1:00 a. m. on a Sunday. A violation of N. D. C. C. ' 5-02-05 is a class A misdemeanor punishable by up to one year in jail, a \$1,000 fine, or both such fine and imprisonment.

N. D. C. C. ' 5-02-05 provides:

5-02-05. Dispensing prohibited on certain days - Penalty. Except as permitted by sections 5-02-05.1 and 5-02-05.2, any

person who dispenses or permits the consumption of alcoholic beverages on licensed premises after one a.m. on Sundays, before eight a.m. on Mondays, or between the hours of one a.m. and eight a.m. on all other days of the week, or who dispenses alcoholic beverages or permits consumption of alcoholic beverages on licensed premises on Christmas Day, after one a.m. on Good Friday or Thanksgiving Day, or after six p.m. on Christmas Eve is guilty of a class A misdemeanor.

A N. D. C. C. ' 5-02-01.1 permit is not listed in N. D. C. C. ' 5-02-05 as within the exceptions to its Sunday liquor dispensing or consumption prohibition. By its express language, N. D. C. C. ' 5-02-05 requires an alcoholic beverage licensee to obtain either a N. D. C. C. ' 5-02-05.1 or a N. D. C. C. ' 5-02-05.2 permit from the local governing board to permit that licensee to dispense or permit consumption of alcoholic beverages on the licensed premises after 1:00 a.m. on a Sunday.

N. D. C. C. ' 5-02-5.1(1) provides:

5-02-05.1. Special Sunday alcoholic beverage permit - Penalty.

1. Any city or county may issue a special Sunday alcoholic beverage permit to a private club, lodge, restaurant, motel, or hotel licensed as a retail alcoholic beverage establishment under chapter 5-02; or to a publicly owned or operated facility. A county may not issue a permit under this section to a private club, lodge, restaurant, motel, or hotel located within the geographical boundaries of a city.

The term "restaurant" is defined in N. D. C. C. ' 5-02-05.1(5) as:

5. For purposes of this chapter, unless the context otherwise indicates, "restaurant" means a commercial establishment that is licensed to engage in the sale of alcoholic beverages at retail pursuant to this chapter, and which has a city, county, or state restaurant license and has paid the appropriate city food and lodging taxes for a continuous six-month period before the application for the permit, or which derives fifty percent or more of its annual gross receipts from the sale of prepared meals and not alcoholic beverages.

N. D. C. C. ' 5-02-05.2 provides:

5-02-05.2. Local approval of Sunday beer and wine sales by eating establishments - Fee. The local governing body may provide in any on sale liquor or beer license the right of an eating establishment to dispense and sell beer and wine in conjunction with the sale of prepared meals on Sunday between the hours of twelve noon and nine p.m. for consumption only in that part of the

eating establishment habitually used for the serving of prepared meals. As used in this section, "eating establishment" means a restaurant or other commercial establishment that is licensed to engage in the sale of alcoholic beverages at retail pursuant to this chapter, and which has a city, county, or state restaurant license and has paid the appropriate city food and lodging taxes for a continuous six-month period before the application for the permit, or which derives fifty percent or more of its annual gross receipts from the sale of prepared meals and not alcoholic beverages. Where this provision is made in an on sale license, the governing body may require the licensee to pay an additional annual fee or not more than one hundred fifty dollars.

If an alcoholic beverage licensee does not have a N. D. C. C. ' 5-02-05.1 or N. D. C. C. ' 5-02-05.2 permit issued in accordance with the respective statutory provisions, that licensee will not be permitted to dispense or allow consumption of alcoholic beverages on the licensed premises after 1:00 a. m. on a Sunday. The possession of a permit issued under N. D. C. C. ' 5-02-01.1 alone does not authorize the licensee to engage in dispensing or allowing consumption of alcoholic beverages after 1:00 a. m. on a Sunday.

In addition to the provisions of N. D. C. C. ' 5-02-05, the North Dakota Sunday closing law also restricts the sale of alcoholic beverages on a Sunday. N. D. C. C. ' 12.1-30-03 authorizes certain businesses to operate on a Sunday. In its listing of businesses authorized to operate on Sunday, N. D. C. C. ' 12.1-30-03(37) provides:

12.1-30-03. Businesses allowed to operate on Sunday -
Limitations. Subject to the limitations of this section and section 12.1-30-02, a business specified in this section may operate in the business' usual manner, location, and for its usual purposes. The businesses authorized under this section to operate on Sunday include:

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37. Premises licensed to dispense beer and alcoholic beverages within the limits prescribed in sections 5-02-05, 5-02-05.1, and 5-02-05.2.

As in the case of N. D. C. C. ' 5-02-05, the Sunday closing law does not list N. D. C. C. ' 5-02-01.1 as one of the permits under which an alcoholic beverage licensee may lawfully operate on a Sunday. Rather, an alcoholic beverage licensee would be permitted to operate on a Sunday under the Sunday closing law only if that licensee possessed a N. D. C. C. ' 5-02-05.1 or N. D. C. C. ' 5-02-05.2 permit issued by the appropriate local governing body.

Prior to its amendment by the 1991 North Dakota Legislative Assembly, N. D. C. C. ' 5-02-05.1 granted cities and counties broad discretion in determining the

definition of a "restaurant." This broad discretion permitted many alcoholic beverage establishments to qualify for an N. D. C. C. ' 5-02-05.1 permit because the city or county governing board determined that the alcoholic beverage licensee was a "restaurant."

The 1991 Legislative Assembly, however, imposed limitations on the type of alcoholic beverage establishments which would be permitted to be open on a Sunday. The 1991 Legislature removed discretion from the city and county governing boards to determine whether an alcoholic beverage licensee was a "restaurant." In its place, the Legislature defined the term "restaurant." This definition, as found in N. D. C. C. ' 5-02-05.1(5) and as set forth above, limited the number of alcoholic beverage licensees which would qualify for the N. D. C. C. ' 5-02-05.1 permit. The practical effect of the amendments is that alcoholic beverage licensees which were lawfully open prior to the effective date of these amendments could no longer qualify for the Sunday permit after these amendments became law.

The question of whether a N. D. C. C. ' 5-02-01.1 permit would be sufficient, standing alone, to authorize the sale, dispensing, or consumption of alcoholic beverages on a Sunday was addressed by the House Committee on State and Federal Government during its deliberations on Senate Bill No. 2482. Representative Martinson, after a discussion on the interplay between the amendments to N. D. C. C. ' 5-02-01.1 and N. D. C. C. " 5-02-05.1 and 5-02-05.2 read into the record of the Committee hearing, the following:

It is the intent of this bill that only those establishments who qualify for a Sunday permit under section 5-02-05.1 are eligible to receive a Sunday permit under section 1 of this bill.

Hearing on S. 2482 before the House Comm. on State and Federal Government, 52nd Leg. (Feb. 28, 1991) (Statement of Rep. Martinson).

In summary, the issuance of a N. D. C. C. ' 5-02-01.1 permit by a local governing body is not sufficient alone to authorize an alcoholic beverage licensee to sell, dispense, or otherwise allow consumption of alcoholic beverages on licensed premises after 1:00 a.m. on a Sunday. Only those alcoholic beverage licensees that qualify for, and receive, a permit issued by the local governing body pursuant to N. D. C. C. " 5-02-05.1 or 5-02-05.2 may allow the consumption of alcoholic beverages on licensed premises or sell or dispense alcoholic beverages after 1:00 a.m. on a Sunday. If an alcoholic beverage licensee does not have a N. D. C. C. ' 5-02-05.1 or N. D. C. C. ' 5-02-05.2 permit, that alcoholic beverage licensee may not lawfully engage in activities prohibited by N. D. C. C. " 5-02-05 and 12.1-30-03(37).

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is

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decided by the courts.

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